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No. 96-1570

In The

Supreme Court of the United States

October Term, 1997

NYNEX CORPORATION, *et al.*,

Petitioners,

vs.

DISCON, INCORPORATED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether an agreement between a purchaser and a supplier to eliminate a competing supplier may be condemned as an unlawful group boycott in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Whether a purchaser may conspire to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, when the purchaser agrees with a supplier to eliminate a competing supplier with the specific intent to assist the first supplier in its acquisition or maintenance of monopoly power.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iv
Statement	1
A. The Amended Complaint	3
B. The Court of Appeals' Decision	8
Summary of Argument	9
Argument	13
I. The Court Of Appeals Properly Concluded That A Vertical Agreement To Exclude A Competing Supplier May Be A *Per Se* Unlawful Group Boycott.	14
A. The "Group Boycott" *Per Se* Analysis is Applicable To The Present Case.	14
B. Petitioners Rule of Reason Arguments on the Section 1 Claim Should Not Be Considered.	20
C. Discon Has Stated A Cause of Action Under Section 1 of the Sherman Act Regardless of Whether A *Per Se* or Rule of Reason Analysis Applies.	20

Contents

	Page
1. Allegations of Harm to Competition .	21
2. *The Relevant Market — "The Illusion of* Competing Sellers"	23
3. The Involvement of Regulated Monopolies Does Not Affect Antitrust Enforcement Respecting Unregulated Markets.	28
D. Competitive Harm Alleged By Discon Was Its Exclusion From The Unregulated Supplier Markets.	29
E. Competitive Harm In the Removal Services Market Is Adequately Alleged.	32
II. A Purchaser-Supplier Agreement to Exclude a Competing Supplier Can Constitute an Unlawful Conspiracy to Monopolize When the Conspirators Intend for the Conspiring Competitor to Monopolize the Market.	36
Conclusion	41

Page

TABLE OF CITATIONS

Cases Cited:

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 26, 37

Arizona v. Maricopa County Medical Soc., 457 U.S. 332 (1982) 10

Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 13

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 10, 14, 21

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 21, 25

Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977) 21

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) 8, 11, 16, 17, 18

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) 28, 29, 30, 31, 32, 34

Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101 (7th Cir. 1984), *cert. den.*, 470 U.S. 1054 (1985) 13

Page

Conley v. Gibson, 355 U.S. 41 (1957) 13, 25

Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36 (1977) 16, 17, 27

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 15, 29, 31, 34

Eastman Kodak Company v. Image Technical Services, Inc., 504 U.S. 451 (1992) 11, 25, 34

Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986) 17, 33

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) 11

General Electric Co. v. Bucyrus-Erie Co., 563 F. Supp. 970 (S.D.N.Y. 1983) 27

George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551 (2d Cir. 1977) 13

Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774 (7th Cir. 1994) 13

Hart v. B.F. Keith Vaudeville Exchange, 262 U.S. 271 (1923) 21

Hishon v. King & Spalding, 467 U.S. 69 (1984) 13

Contents

Page

H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989) 13

Hospital Building Co. v. Trustees of Rex Hospital, 462 U.S. 738 (1976) 21, 27

Izumi Seimitsu Kogyo Kabashiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) 20, 38

Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) 11

Kartell v. Blue Shield (Mass.), 749 F.2d 922 (1st Cir. 1984), *cert. den.*, 471 U.S. 1029 (1985) 39

Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1990) 8, 14, 18, 19

Leatherman v. Tarrant County Narcotics Intelligence and Co-ordination Unit, 507 U.S. 163 (1991) 13

Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 11

McLain v. Real Estate Board of New Orleans, 444 U.S. 232 (1980) 21

MCM Partners v. Andrews — Bartlett & Assocs., 62 F.3d 967 (7th Cir. 1995) 13, 25, 31

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 27

Contents

Page

N.C.A.A. v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984) 21, 25

Northeastern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) 36

Northern Pacific R. Co. v. United States, 356 U.S. 1 (1958) 10, 19

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 286 (1985) 15, 16

Olsen v. Progressive Music Supply, 703 F.2d 432 (10th Cir.) 37

Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986) (Posner, J.), *cert. den.*, 480 U.S. 987 (1984) 40

Perrington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369 (10th Cir. 1979) 36

Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962) 21

Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., 711 F.2d 989 (11th Cir. 1985) 13

Salco Corp. v. General Motors Corp., 517, F.2d 567 (10th Cir. 1975) 37

Contents

	Page
Scheuer v. Rhodes, 416 U.S. 232 (1974)	13
Spectrum Sports, Inc. v. McQuillen, 506 U.S. 447 (1993)	37
State Oil Co. v. Khan, 118 S. Ct. 271 (1997)	10, 11, 17
St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978)	15, 18
Strobl v. New York Mercantile Exchange, 561 F. Supp. 379 (S.D.N.Y. 1983)	36
TV Communications Network, Inc. v. Turner Network Television. Inc., 964 F.2d 1022 (10th Cir.), *cert. denied*, 506 U.S. 999 (1992)	40, 41
United States v. American Tel. And Tel. Co., 461 F. Supp. 1314 (D.D.C. 1978)	28
United States v. American Tel. And Tel. Co., 524 F. Supp. 1336 (D.D.C. 1981)	28
United States v. American Tel. And Tel. Co., 552 F. Supp. 131 (D.D. Col. 1982), *aff'd sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983)	1, 11, 28, 30, 32
United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993)	21
United States v. Consolidated Launderies Corp., 291 F.2d 563 (2d Cir. 1961)	37

Contents

	Page
United States v. E.I. DuPont deNemours & Co., 351 U.S. 377 (1956)	25, 26, 37, 41
United States v. Grinnell Corp., 384 U.S. 563 (1966)	25, 26, 33
United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610 (1977)	12, 36

Statutes Cited:

15 U.S.C. § 1	i, 2, 14, 29
15 U.S.C. § 2	i, 12, 25, 36, 37, 38, 41
15 U.S.C. § 5	2

Rule Cited:

Sup. Ct. Rule 14.1(a)	38

Other Authorities Cited:

ABA Section of Antitrust Law, *Antitrust Law Developments* (4th ed. 1977)	21, 22, 31
ABA Section of Antitrust Law, 1997 *Annual Review of Antitrust Law Developments*	31
IIA P. Areeda, H. Hovenkamp and J. Solow, *Antitrust Law* (Rev. Ed. 1995)	39, 40

Contents

Page

IIIA P. Areeda and H. Hovenkamp, *Antitrust Law* (Rev. Ed. 1996) 19, 23, 30, 32

VII P. Areeda, *Antitrust Law* (1986) 14

L. Sullivan, *Law of Antitrust* (1977) 15

P. Areeda & H. Hovenkamp, *Antitrust Law; An Analysis of Antitrust Principles and Their Application* (1997 Supp.) 20, 23, 30

P. Areeda and L. Kaplow, *Antitrust Analysis* (1988) .. 40

R.D. Blair and J.L. Harrison, *Monopsony-Antitrust Law and Economics* (1993) 18

R.H. Bork, *The Anti-Trust Paradox: A Policy At War With Itself* (1978) 19

2 J. VonKalinowski, P. Sullivan and M. McGuirl, *Antitrust Laws and Trade Regulation* (2d ed. 1996) 36, 37

New York Telephone Company, 5 F.C.C.R. 866 (1990) 7, 22

New York Telephone Company, 5 F.C.C.R. 5892 (1990) 7, 22

STATEMENT

Respondent, Discon Incorporated ("Discon"), had, as its primary business, provision of "removal services" to telephone companies, those being the "salvage and disposal of obsolete telephone central office equipment". J.A. 78 (Am. Compl. ¶ 13). Petitioner NYNEX Corporation (NYNEX) was, during the period covered by the Amended Complaint, the parent corporation of Petitioner New York Telephone Company (NYT), a provider of regulated telephone service in the State of New York, and of Petitioner NYNEX Material Enterprises Company (ME Co.), a subsidiary of NYNEX after December 31, 1983, which was originally created by American Telephone and Telegraph Company (AT&T) to purchase products and services "to achieve economies and other increased efficiencies". J.A. 82 (Am. Compl. ¶ 24). AT&T caused MECo. and NYT to enter an agreement on December 30, 1983 which purported to provide to NYT a procurement entity. Thereafter, AT&T transferred control of MECo. to NYNEX on January 1, 1984 as part of the AT&T divestiture litigation.[1]

AT&T, as part of the divestiture process, formed certain subsidiaries, AT&T Technologies (Technologies) and AT&T Communications (ATC). Technologies was in the business of removal services. ATC was in the business of providing interexchange services which required removal services for its equipment.

MECo. exercised authority granted to it by NYNEX to approve vendors to NYT, including removal services. Prior to MECo.'s transfer to NYNEX on January 1, 1984, the NYT-MECo. agreement of December 30, 1983 contemplated publication of price lists to third party vendors of services to encourage suppliers such as Discon to offer services to NYT through ME Co. to facilitate the undercutting of existing prices, many of which AT&T had set when Western Electric was a monopoly supplier. J.A. 82 (Am. Compl. ¶ 24).

Prior to the AT&T divestiture, Western Electric, Technologies' predecessor, performed virtually all removals at NYT's central exchange offices. Post-divestiture, Technologies was the exclusive

1. *United States v. American Tel. And Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983) (hereafter "AT&T Case").

supplier of removal services to ATC. J.A. 82-83 (Am. Compl. ¶ 26).

The AT&T Case consent decree required NYT to provide equal access to interexchange service. Consequently, NYT had to remove substantial portions of its central offices' equipment and install new electronic switches. The NYT network services requirements were approximately $50 million annually after divestiture. J.A. 83 (Am. Compl. ¶ 28). NYT, as of December 31, 1989, after divestiture, served 89.9% of all local lines in New York State and supplied more than 95% of exchange service and exchange access. J.A. 81 (Am. Compl. ¶ 33).

Initially in 1984, Discon bid and sold removal services to NYT directly and through ME Co. In June 1984, and thereafter for a two-year period, AT&T, NYT, NYNEX, MECo. and Technologies, through their personnel, engaged in a number of overt acts to prevent and exclude Discon from competing in the market for removal services, including, for example, redirecting of contracts to Technologies although same had been awarded by NYT to Discon as the lowest bidder. J.A. 84-92 (Am. Compl. ¶¶ 32-57).

In June 1986, Discon was decertified by MECo. as an approved vendor for MECo. and NYT, and thereby precluded from submitting bids for removal services at NYT or for NYT. Thereafter, in September 1986, a MECo. employee advised Discon's principal that Discon would not be permitted to work for MECo. or NYT until Discon signed a release and returned evidence of illegal markups and incidents of discrimination favoring Technologies. J.A. 91 (Am. Compl. ¶¶ 55-56).

In May 1988, subsequent to an audit of NYT by the New York Public Service Commission (PSC), NYNEX directed NYT to deal directly with vendors for all removals. By this time, Discon had ceased business. J.A. 92 (Am. Compl. ¶ 58).

Subsequent to the PSC's audit and the existence of Federal Communications Commission (FCC) investigations and hearings, Discon concluded it had been the subject of conduct violating the anti-trust laws and sued for treble damages under the Sherman Act, 15 U.S.C. §§ 1, 2, & 5. The Court of Appeals held that Discon had alleged two valid anti-trust claims, for conspiracy in restraint of trade

and conspiracy by the Petitioners herein to assist Technologies in monopolization of the market for removal services. (Pet. App. 12a-13a, 14a-15a).

The Court of Appeals' decision should be sustained. The court recognized that the Petitioners' activity, with that of Technologies, was addressed to stifling of or suppression of competition in the removal services market. The removal services market was not regulated. MECo. was set up as a regulation avoidance mechanism. The court addressed anti-trust issues raised in the Amended Complaint, that the regulation avoidance mechanism chosen by the Petitioners participated in the conspiracy to suppress and/or eliminate competition in the removal services market in which one of the conspirators competed. The harm to competition is evident where MECo., essentially a gatekeeper that designated who could compete in the removal services market, was used as an instrument by NYNEX and AT&T to suppress or destroy competition in the removal services market and thereby advance AT&T's (Technologies') efforts to monopolize that market.

A. The Amended Complaint

Discon's Amended Complaint was determined, by the Court of Appeals, to state two valid antitrust claims, for conspiracy in restraint of trade and conspiracy to monopolize. The determination was made in the context of a motion to dismiss, with the allegations of the Amended Complaint assumed to be true.

Discon's Amended Complaint set forth allegations that NYNEX, NYT and MECo. engaged in overt conduct in furtherance of a conspiracy to effect exclusion of Discon from the market for provision of removal services to NYT and in the State of New York. The particulars of the conspiracy, as evinced by overt acts and certain agreements have been plead in paragraphs 26 to 58 and 110 to 112 of the Amended Complaint. J.A. 82-92, 112-113. These acts were all directed against Discon's efforts to compete in the market for provision of removal services to NYT and in the New York State area.

Subsequent to divestiture, NYT was responsible to provide equal access to interexchange carriers, resulting in the need for a large number of equipment removals and installation of exchange

control offices. J.A. 81 (Am. Compl. ¶ 22). After divestiture, NYT was the dominant exchange carrier in New York State, serving 89.9% of all network access lines in the State and providing over 95% of exchange service and exchange access respecting those lines. J.A. 81 (Am. Compl. ¶¶ 22-23).

The AT&T Case consent decree, controlling divestiture, required NYT to effect equipment removals, to provide equal access to interexchange services, with installation of new electronic switches. This resulted in NYT having post-divestiture network service requirements of about $50 million per year. J.A. 83 (Am. Compl. ¶ 28). ATC, as the result of divestiture, operated an interexchange network in New York State, complementing the NYT provision of equal access to interexchange service. With NYT's dominance of the exchange carrier service and ATC's complementing dominance of the interexchange network, the two firms were the dominant purchasers of removal services in New York State. J.A. 82-83 (Am. Compl. ¶¶ 26, 28 and 29).

The Amended Complaint sets forth the pre-divestiture structure of the provision of removal services, the allegations in respect of which provide the basis for the allegation that Technologies is the dominant provider of removal services in the State of New York and to NYT. Prior to divestiture, Western Electric Company, Inc., Technologies' predecessor, performed virtually all removal services at NYT's central exchange offices. J.A. 82 (Am. Compl. ¶ 26). Technologies, post-divestiture, continued to be the exclusive supplier of removal services to ATC. J.A. 82-83 (Am. Compl. ¶ 26). It was well-positioned to compete with Discon in the provision of removal services to NYT, both as the successor to Western Electric and by taking advantage of its parent's, AT&T's, making of agreements with NYNEX and MECo. to obtain beneficial discriminatory treatment in competition with Discon for projects on which Discon bid or was asked to bid for removal services. The overt acts of Technologies, MECo., AT&T and NYNEX are set forth in the Amended Complaint, and give fair notice of the events being alleged as constituting a conspiracy to suppress competition to perpetuate Technologies' dominant position as supplier of removal services. These acts are set forth at J.A. 82-92 and 112-113 (Am. Compl. ¶¶ 26-58 and 112-113), and include the reassignment to Technologies of removal

contracts won by Discon as low-bidder, J.A. 86 (Am. Compl. ¶ 34), and MECo. personnel advising Discon's principal in September 1986 that Discon would not work for MECo. or NYT until a release was signed and evidence of incidents of discrimination in favor of Technologies was returned. J.A. 91 (Am. Compl. ¶ 56).

In a period commencing early in 1984, NYT was directly bidding out and awarding jobs to Discon as low-bidder, when MECo. engaged in a series of retaliatory acts was to coerce Discon to work only through MECo. Examples were plead by Discon. J.A. 86-91 (Am. Compl. ¶¶ 34 [job reassignment to Technologies], 36 [Technologies to have supervisory and quality control responsibility on contracts awarded to Discon], 37 [ME Co. refused to provide written contracts or authorization for three substantial projects in violation of procurement procedures], 38 [ME Co. impose obligations on Discon outside of contract terms], and 43 [Technologies complains to NYT it lost a bid because ME Co. marked Discon's bid up less than Technologies']).

The impact of the aforesaid practices against Discon was magnified in the context of removal services for NYT in that most Bell Operating companies (BOC(s)), after divestiture, determined to either use unaffiliated contractors for removal services or to use employees whose wages were charged directly into regulated accounts. Of over 400 removals to be performed for NYT, its personnel did four (1%), NYT administered bids for about forty (about 10%), and MECo. was contracted for the remainder. J.A. 83 (Am. Compl. ¶ 27).

In June 1986, MECo. decertified Discon as an approved vendor, although no reason was given and NYT personnel refused to meet with Discon to explain the actions. J.A. 91, (Am. Compl. ¶¶ 54-55). Contrary to what the Petitioner chose to present as the reason for Discon's termination as a vendor, that such reason was a pretext is clear from MECo.'s approach to Discon's principal in September 1986, advising that Discon could not work for MECo. until he signed a release and returned evidence of incidents of discrimination in favor of Technologies. J.A. 92 (Am. Compl. ¶ 56).

Discon's termination was merely the final step in the effort of NYNEX, MECo. and Technologies to suppress competition in the

removal services market, a step which MECo. offered to reverse upon receipt of a release and return of evidence of illegal bid markups and of incidents of discrimination in favor of Technologies. J.A. 91, (Am. Compl. ¶¶ 54-57). Petitioners' assertion that Discon merely alleges its termination as a supplier to "NYNEX" was the result of a conspiracy between AT&T and NYNEX by alleging no more than a agreement to "discriminate against Discon" and to "eliminate Discon from the market" ignores the pleading of specific overt acts culminating in a request by MECo. to Discon to give a release and surrender evidence of discrimination favoring Technologies' if Discon wanted an opportunity to work for MECo. and NYT. J.A. 84-91 (Am. Compl. ¶¶ 33-56). The MECo.-Technologies Agreement referred to at J.A. 112 (Am. Compl. ¶ 110), was, in part, that Discon would be decertified as a vendor and discredited before public authorities, with the balance of the allegations therein referring to how MECo. and Technologies would structure their relationship respecting removal services to be provided through MECo. by Technologies. These allegations, including reference to specific overt acts, establish conduct to stifle competition by effecting an exclusion of Discon from the removal services market.[2]

Petitioners persist in characterizing the Amended Complaint as a scheme undertaken "by NYNEX to engage in regulatory fraud as a seller of telephone services." Pet. Br. at 6. A basic flaw in that perspective is that the Amended Complaint addresses and alleges the creation of a regulation avoidance entity, MECo, which NYNEX, AT&T and Technologies used to stifle Discon's competition with

2. Petitioners state, Pet. Br. at 5, that Discon characterizes its Amended Complaint, not as alleging a "full requirements" or other exclusive-dealing contract between NYNEX and AT&T, but as alleging AT&T provided "the lion's share" of removals needed by NYNEX, citing Respondent's Br. In Opp. at 5. The text of Br. In Opp. actually refers to NYT and AT&T being the dominant purchasers of removal services in New York State and that MECo. and Technologies were the dominant suppliers of removal services, with Technologies performing all removals needed by ATC and, through ME Co., the "lion's share" of removals needed by NYT. The Br. In Opp. text referred to by Petitioner deals with dominance in the purchaser and supplier markets, not characterization of an "agreement".

Technologies, after the removal services' market competition was eliminated, Petitioners then were able to defraud regulators.[3]

Petitioners' observation that the Amended Complaint contains no allegations about exclusion of other competitors selling removal services, about resulting constriction of supply that harmed the buyers of removal service (telephone companies) or about barriers to entry into the business (Pet. Br. at 5-6) is inaccurate in the sense that Petitioners are aware that MECo certified and approved removal service providers for work with MECo. and NYT, as part of its agreement with NYT to procure services and products. MECo's characteristics, its relationships with the other Petitioners and Technologies, and the use of its powers against Discon are alleged throughout the complaint. J.A. 79 (Am Compl. ¶ 16), J.A. 82 (Am. Compl. ¶¶ 33 (e-g), 34, 37 and 38). The regulated recipient of removal services was controlled by the participants in the conspiracy to exclude Discon and was deemed by a regulating authority to have been the subject of MECo's unreasonable charges and markups.[4]

3. The Petitioners use of MECo. as a regulatory avoidance entity is reflected in Petitioners' position in *New York Telephone Company*, 5 F.C.C.R. 866 (1990) (enforcement action for unreasonable markups and overcharges by MECo. incorporated into NYT's rate base) and the resulting settlement by consent decree, 5 F.C.C.R. 5892 (1990) in which one of the negotiated points was that there was no resolution of the federal agency's jurisdiction over MECo, an NYT defense in the proceeding. Petitioners implicitly acknowledge that MECo was an unregulated affiliate of NYT in the dispute with the FCC on whether an unregulated affiliate is limited to a regulated entity's prescribed rate of return as part of the FCC's investigation of unreasonable markups by MECo. Br. For Petrs. at 7 n.6. This corresponds with Respondents' allegations, in the Amended Complaint, that MECo was created to avoid regulation, and consequently was intended to operate in an unregulated market. J.A. 79 (Am. Compl. ¶ 16), J.A. 80-81 (Am. Compl. ¶ 21), J.A. 82 (Am. Compl. 24-25). MECo's creation was in the context of the AT&T Case's prohibition on BOC(s)' providing a "product or service that is not a natural monopoly service actually regulated by tariff". *AT&T Case*, 552 F. Supp. *supra*, at 187.

4. *See New York Telephone Company*, 5 F.C.C.R. 866 (1990) (initiating enforcement action) at 5 F.C.C.R. 5892 (1990) (settlement including refund); J.A. 83-84 (Am. Compl. ¶ 30) (FCC Proceeding); J.A. 79 (Am. Compl. ¶ 16) (referring to PSC proceedings resulting in direction to NYNEX that MECo's activities for the BOC(S) NYT and New England Telephone [NET] be transferred to an NYT-NET-owned subsidiary).

Other removal services suppliers referred to in the Amended Complaint, *i.e.*, McGee and LISN, were part of the conspiracy to monopolize. J.A. 111 (Am Compl. ¶ 107). J.A. 84-85 (Am. Compl. ¶ 33(a)).

B. The Court of Appeals' Decision

The Court of Appeals reversed in part and affirmed in part (Pet. App. 1a-20a) the District Court's dismissal of the Amended Complaint (Pet. App. 21a-52a). The Court of Appeals, respecting Discon's Section 1 claim, agreed with the District Court that because MECo could not be characterized as a supplier of removal services, Discon could not prevail on a theory of horizontal restraint of trade, on which theory Discon had "primarily" relied. Pet. App. 8a, 10a. In its reading of the Amended Complaint, the Court of Appeals determined that the pleadings stated a Section 1 cause of action under a legal theory different from that "articulated by Discon". Pet. App. 7a, 10a.

The Court of Appeals, with reference to *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211-12 (1990), determined that an agreement between vertically related parties, such as between a single supplier and a single purchaser, could be described as an unlawful "group boycott" if the agreement's intent and effect was a "horizontal market impact". Pet. App. 10a-11a. The court, after noting that two-firm vertical combinations were generally "scrutinized as exclusive distributorship controversies, rather than a group boycotts" (Pet. App. 12a) (citing to *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 725-31 (1988)), determined Discon had stated a cause of action "under, at least, the rule of reason", and "possibly under the *per se* rule applied to group boycotts . . . , if the restraint of trade has no purpose except stifling competition." Pet. App. 13a.

The circuit court did not specifically identify any specific market affected by the alleged conspiracy of AT&T and the Petitioners to exclude Discon.[5] Also, the court did not identify a particular

5. The amended complaint itself states that the conspiracy sought "to exclude Discon from the market for removal services." J.A. 84 (Am. Compl. ¶ 33); J.A. 76 (Am. Compl. ¶ 3) referring to the conspiracy "to restrain trade in the market for (Cont'd)

anti-competitive effect of the alleged conspiracy.[6/]

Discon's Section 2 claim for conspiracy to monopolize was reinstated by the Court of Appeals. Pet. App. 14a. The court's reasoning was that the amended complaint sufficiently alleged that the Petitioners "conspired with "Technologies" and performed overt acts intending to assist [Technologies] in its monopolization of the market for removal services." Pet. App. 14a-15a. After noting that "to be liable for conspiracy to monopolize, it is not necessary that the [Petitioners] compete directly in the market for removal services." (Pet. App. 14a), the court determined that a party "may be liable for conspiracy to monopolize where it agrees with another firm to assist that firm in its attempt to monopolize the relevant market." *Id.*

SUMMARY OF ARGUMENT

The amended complaint sets forth a conspiracy, involving a competitor of Discon, to stifle and eliminate competition in the market for removal services in the State of New York and at central offices of NYT, which controlled almost 90% of local telephone services in the State of New York. This conspiracy was not, as some would have it, the mere changing of suppliers to lower cost and improve quality, but to eliminate competition in the unregulated removal services supplier market. It is a case for

(Cont'd)
removal services . . . purchased by telephone companies. . . ."; the acts to effect exclusion of Discon alleged to have occurred with respect to removal services being purchased by NYT directly or being provided through MECo. to NYT are also alleged. J.A. 84-92 (Am. Compl. ¶¶ 33-57).

6. Petitioners' assertion, that the Court of Appeals identified the anti-competitive effect of Discon's exclusion as overcharges of a regulated monopoly's rate-paying customers, is inaccurate. The Court of Appeals' comments concerned whether the Petitioners could present some pro-competitive justification "for choosing a more costly supplier in order to overcharge rate-paying customers, ..." Pet. App. 12a. The focus was on the supplier market and the amended complaint's allegations of the choice of Technologies over Discon being "entirely anti-competitive." *Id.*

7. The Court of Appeals reversed the District Court in finding there was sufficiently alleged a vertical conspiracy among NYNEX, MECo. And Technologies that contemplated discrimination against Discon. Pet. App. 7a n.3.

per se treatment as a blatant effort to control a market to benefit a competitor-conspirator.

A plea to protect a buyer's "freedom to replace one supplier with another" is unavailing in circumstances wherein the conspiracy alleged sought to suppress supplier interbrand competition in an unregulated competitive supplier market and thereby avoid the benefits of lower costs and prices, subsequently permitting the passage of the increased prices to captive ratepayers by the regulated monopolist participating in the conspiracy. The anti-competitive effect of the conspiracy was the suppression of competition in the unregulated removal services supplier market by the exclusion of Discon. The relevant market affected was controlled, both in access thereto and exclusion therefrom by one of the parties to the vertical agreement between one of the Petitioners and its supplier who dominated the supplier market. The conspirators themselves, by their conduct, gave shape to the relevant market.

The Court of Appeals concluded that a vertical agreement between a firm and its supplier to exclude a competing supplier may be treated as a "group boycott", addressable both under the rule of reason and the *per se* rule if the "restraint of trade has no purpose except stifling competition". The Second Circuit was well-justified in its analysis, because the amended complaint admits of no pro-competitive justification. There has been no discovery to date and thus no proof offered by the parties. The Court of Appeals observed that the traditional rationale for applying the rule of reason to two-firm group boycotts, promoting interbrand over intrabrand competition, was absent.

This Court has long observed that some type of restraints have predictable and pernicious anti-competitive effects, and such limited potential for pro-competitive benefit, they are deemed unlawful *per se*. *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958) "*Per se* treatment is appropriate '[o]nce experience with a particular type of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *State Oil Co. v. Khan*, 118 S. Ct. 271, 279 (1997), citing *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 344 (1982) and *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19, n.33 (1979).

This is because the character of the restraint produced by behavior to which a *per se* rule applies suffices for presuming unreasonableness without analysis of the market context in which the behavior occurs. *Eastman Kodak v. Image Technical Services*, 504 U.S. 451, 486-87 (1992) (Scalia, J., dissenting) citing *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984). The Court is reluctant to adopt *per se* treatment of restraints imposed in business relationships where their "economic impact . . . is not immediately obvious." *State Oil Co.*, 118 S. Ct. at 279, citing *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458-459 (1986). The primary purpose of anti-trust laws is to protect interbrand competition. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988). There is, in the context of the amended complaint, no attack on pro-competitive practices resulting in lower prices (or other procompetitive benefits) as was frowned on by the Court in *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986), cited in *State Oil Co.*, 118 S. Ct. at 282.

The Court of Appeals noted that the traditional rationale for the rule of reason's application, promotion of interbrand over intrabrand competition does not exist in this case. Pet. App. 13a. The courts have had prior experience with conduct similar to that in the present case, wherein boycott conduct and control by regulated telephone companies of supplier markets resulted in the AT&T Case consent decree respecting the Bell System breakup.

The history of AT&T control over the BOC(s), and its ability to thereby prevent competition at various levels, through its vertically integrated monopoly, resulted in a general prohibition against provision of products or services not a natural monopoly service actually regulated by tariff. *AT&T Case*, 552 F. Supp. at 186-187. While the consent decree was, by its terms, not to have *prima facie* effect in private litigation, *AT&T Case*, 552 F. Supp. at 210-211, the aforesaid prohibition was certainly intended to address conduct such as that in the present case, wherein MECo., acting as a "gatekeeper", of the unregulated supplier market, sought to stifle or exclude competition in that market by exclusion of Discon for Technologies' benefit. The conspiracy in the present case, a vertical agreement to stifle interbrand competition, merits *per se* treatment.

Petitioners seek to present the issue of whether Discon has stated a Section 1 claim in the context of a rule of reason analysis. (Pet. Br. 27-39). The issue is not merely complimentary to, or fairly within, the question presented. However, should the Court so find the issue properly before it, Discon has properly alleged a claim under the rule of reason. The Amended Complaint alleges competitive harm, the relevant market and the conduct complained of in a detailed manner. The conduct challenged is of a type condemnable under a "quick look" rule of reason analysis.

A conspiracy by two firms to monopolize a market was properly held by the Court of Appeals to violate Sherman Act § 2, although only one of the conspirators competed in that market, as long as the other conspirators agreed to assist the competing conspirator in its attempt to monopolize the relevant market. Pet. App. 14a-15a. The gravamen of the alleged violation is that a conspiracy was entered into by two or more parties sharing an intent to create or maintain monopoly power by improper means. *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 612 n.1 (1977).

Petitioners' observation that it is "implausible" that they would assist AT&T in obtaining monopoly power is not borne out in theory or fact. Regulatory avoidance activity involves a profit motive that can induce regulated monopolists to engage in anti-competitive conduct such as effecting exclusion or suppression of competition in unregulated supply markets. It was precisely this profit motive on which the Court of Appeals focused, finding in the amended complaint allegations that Petitioners' motive in helping AT&T obtain monopoly power involved excluding competing removal services suppliers that threatened Petitioners' scheme to evade regulation. Petitioners' benefits from regulatory evasion could well outweigh costs to Petitioners if AT&T attained monopoly power in the supplier market.

Petitioners have also sought to raise issues without the scope of this Court's grant of certiorari on the questions of whether a vertical non-price agreement between "a [p]urchaser" and its "[s]upplier" could "be characterized as a conspiracy to monopolize." Pet. Br. i. Petitioners' argument that the Section 2 claim should be dismissed due to certain alleged pleading deficiencies is not properly before the Court. The pleadings properly stated a claim under Section

2, and the Court is requested to so find in the event the issue is determined to be properly before the Court.

ARGUMENT

This case comes before the Court on a motion to dismiss. In such a context, the Court assumes the facts alleged in the amended complaint can be proven. All factual inferences must be drawn in the plaintiff's favor and against defendants. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). While the lower courts retain power to insist on "some specificity in pleading before allowing a potentially massive factual controversy to proceed [,]," *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983), this Court has reaffirmed that the liberal system of notice pleading applies to all causes of action unless otherwise specified in the Federal Rules of Civil Procedure. *Leatherman v. Tarrant County Narcotics Intelligence and Co-ordination Unit*, 507 U.S. 163, 163-65 (1991). Persistent efforts by anti-trust defendants to seek application of a heightened pleading standard in anti-trust cases have been determined to conflict with *Leatherman*, *id. MCM Partners v. Andrews — Bartlett & Assocs.*, 62 F.3d 967, 976 (7th Cir. 1995); *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778, 782 (7th Cir. 1994). Pre-*Leatherman* cases are of like effect. *See, e.g., Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp.*, 711 F.2d 989, 995 (11th Cir. 1985) (notice pleading is all that is required for anti-trust complaint); *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 554 (2d Cir. 1977).

The movants, herein the Petitioners, must demonstrate, "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); accord, *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (quoted in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 250-51 (1989)). A complaint need contain either direct or inferential allegations respecting the "material elements necessary to sustain recovery under some viable legal theory." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. den.*, 470 U.S. 1054 (1985).

I.

THE COURT OF APPEALS PROPERLY CONCLUDED THAT A VERTICAL AGREEMENT TO EXCLUDE A COMPETING SUPPLIER MAY BE A *PER SE* UNLAWFUL GROUP BOYCOTT.

The Court of Appeals' held that a valid claim had been stated under Sherman Act § 1, at least under the rule of reason, "and possibly under the *per se* rule applied to group boycotts in *Klor's*, if the restraint of trade 'has no purpose except stifling competition.' " Pet. App. 12a-13a. The traditional rationale for the rule of reason's application, promotion of interbrand competition over intrabrand competition, was stated not to exist in this case. Pet. App. 13a, n.6. The Second Circuit's holding was correct, addressing, as it did, the Petitioners' conduct in the stifling of competition in an unregulated removal services market. It is this conduct which the amended complaint addressed.

A. The "Group Boycott" *Per Se* Analysis is Applicable To The Present Case.

In analyzing challenged conduct to determine the existence of a *per se* violation, the Court has focused on whether the conduct challenged, in a functional sense, has a balance of harm and virtue that is predominantly harmful. The Court has identified the critical inquiry as whether the practice in question facially appears to be one "that would always or almost always tend to restrict competition and decrease output, and in what portion of the market . . .[,]", basically a "naked restrain[t] of trade with no purpose but stifling of competition. . . ." *Broadcast Music v. CBS (BMI)*, 441 U.S. 1, 19-20 (1979).

The label applied to the Petitioners' conduct by the Second Circuit, with reference to *per se* analysis, was "group boycott". That term does not have an absolute meaning. As one treatise observes, "Courts often ask themselves whether they should 'extend' a *per se* rule to cover conduct with some 'boycott' or price fixing attributes". VII P. Areeda, *Antitrust Law* ¶ 1510c. Another observes that "[t]here is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the

per se doctrine." L. Sullivan, *Law of Antitrust* 229-230 (1977). This Court has commented that "Exactly what types of activity fall within the forbidden category is, however, far from certain[,]" and that "Some care is therefore necessary in defining the category of concerted refusals to deal that mandate *per se* condemnation." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 286, 294 (1985), citing *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 543 (1978) (concerted refusals to deal "are not a unitary phenomenon").

In the present case, the Petitioners and AT&T conspired to exclude Discon from competing in the removal services market. The Court of Appeals characterized the conduct alleged in the Amended Complaint as a vertical non-price agreement intended to disadvantage one of the conspirators' direct competitors. Pet. App. 10a-11a.[8]

This Court has commented that the *per se* approach has generally involved

> joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny the relationships the competitors need in a competitive struggle."

Northwest Stationers, 472 U.S. at 294 (citations omitted).

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8. The Court of Appeals' applied *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) to determine that MECo.'s acts at the behest of NYNEX and NYT were "guided by a single corporate consciousness" and thus it was not a separate conspirator under the doctrine disavowing Section 1 intracorporate conspiracy. Pet. App. 9a-10a. Due to the stage of the present case, there having been no discovery, it is not yet ascertainable whether MECo.'s creation was, of itself, part of a scheme to control supplier markets for removal services. If so, the *Copperweld* decision itself suggests this conduct would be subject to Section 1 scrutiny because the creation of the entity itself (MECo.) and not its post-creation conduct would be evaluated, i.e., a combination to restrain trade. *Cf.*, 467 U.S. at 773-774 & n. 23. Such conduct is addressed in the Amended Complaint (Am. Compl. ¶¶ 17, 24 and 25) concerning the Eckenrode Synergy Plan and the creation of MECo. by AT&T and transfer of MECo. to NYNEX as a result of the AT&T Case.

> In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, [citations omitted], and frequently the boycotting firms possessed a dominant position in the relevant market.

Id. (Citations omitted). Practices assailed in *per se* cases were not supported "by plausible arguments" concerning enhancement of "overall efficiency" and making "markets more competitive." Such cases had a clear likelihood of anti-competitive effects and remote possibility of countervailing effects. *Id.*

Petitioners' argue that, historically, the *per se* group boycott label is affixed to situations in which agreements among the complainant's competitors at the same level of distribution were the subject of condemnation. Pet. Br. 17, citing *Business Electronics* at 734, and other cases. From this follows that absent some agreement among a complainant's horizontal competitors only a rule of reason analysis need be had as the agreement attacked is vertical. The problem, as the Second Circuit has observed, is that the traditional rationale for the rule of reason's application in this case is absent, as the conduct alleged stifled and suppressed interbrand competition. Pet. App. 13a. In this context, the question is posed as to whether a group boycott label is applicable to an agreement between a purchaser of services and a competitor of the complainant to force the complainant from the relevant market by engaging in a series of overt acts to accomplish that goal. Petitioners would have the Court apply *per se* group boycott analysis only to certain horizontal arrangements. The criteria on which the Court has historically relied calls for a different result.

The Court has, in *Business Electronics*, 485 U.S. at 735-36, stated that "economic analysis supports the view, and no precedent opposes it, that vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels". This conclusion was reached in the context of review of prior Court decisions which evaluated vertical arrangements with an eye to promoting interbrand over intrabrand competition and for preserving the former. In *GTE Sylvania*, for instance, the Court indicated that a *per se* rule in the context of vertical non-price location restraints was unneeded because

such were not needed or effective to protect intrabrand competition, but had real potential to stimulate interbrand competition. 433 U.S. at 51-52. In *Business Electronics*, the Court applied the GTE Sylvania rationale to a price-cutter's dealership termination as the result of the manufacturer's agreement with another dealer, as a plausible purpose of the agreement was to enable the remaining dealer to provide better services under its sales franchise agreement. In *State Oil*, 118 S. Ct. at 282, the Court found it "difficult to maintain that vertically-imposed maximum prices could harm consumers or competition to the extent necessary to justify their *per se* invalidation[,]" citing a portion of the Seventh Circuit opinion, under review, which explained pro-competitive effects of the practice.

If group boycott analysis desponded solely upon the horizontal relationship of conspirators to a complainant, then condemnation under group boycott analysis may be avoided simply by structuring vertically that which cannot be effected horizontally.

In the present case, MECo. was a "gatekeeper", determining by its power of vendor approval (under contract with NYT) who could compete in the provision of removal services to NYT. Existence of competitors of Technologies (AT&T) was a function of whom MECo. approved as vendors. Though Discon was approved by MECo., it was determined, as part of the conspiracy set out in the Amended Complaint, that Discon had to be excluded from the market for removal services to NYT and in the New York State area. J.A. 84-91 (Am. Compl. ¶¶ 31-56). The suppression of competition in the unregulated removal services market was effected by overt acts of MECo., AT&T, NYNEX, NYT and Technologies to implement the challenged vertical agreement. J.A. 84-91 (Am. Compl. ¶¶ 32-57). The two predominant buyers of removal services were involved, *i.e.* NYNEX and AT&T, as well as Discon's major competitor, Technologies. J.A. 82-83 (Am. Compl. ¶¶ 26, 29). Exclusion of Discon from the removal services market cut off Discon's access to NYT, a dominant purchaser of removal services.[9]

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9. A relevant market may be one to which access is sought, that is, foreclosed by the challenged conduct. In the present case, the Amended Complaint sets forth the overt acts to exclude Discon from the removal services market. *Cf., Fishman v. Estate of Wirtz*, 807 F.2d 520, 531-32 (7th Cir. 1986).

Where a competitor of the complainant conspires by vertical agreement with parties controlling the dominant purchasers of removal services, *i.e.* NYNEX (NYT) and AT&T (ATC), to effect through overt acts the exclusion of the complainant, there is not merely a choice of one supplier over another. In *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209-210 (1959), Broadway-Hale, the owner of a chain of department stores, used what the Court described as its "monopolositic buying-power" as a means of convincing several appliance manufacturers not to deal with Klor's, a small single outlet retail competitor. Rather than concentrate its buying power to obtain the lowest possible price from the manufacturers, Broadway-Hale exacted agreement not to sell to Klor's, its competitor. This practice was held to violate the Sherman Act, and the opinion can be regarded as declaring group boycotts *per se* illegal.

In *Business Electronics*, 485 U.S. at 734, the Court chose to characterize its Klor's decision as involving a horizontal combination at the manufacturer/distributor level although the party inducing the conduct against its competitor through its monopsonistic power was, as is Technologies (AT&T), the beneficiary of the condemned conduct at another market level. The *Business Electronics'* treatment of *Klor's* has been termed a "reinterpretation" of *Klor's* by commentators analyzing the case from a monopsony perspective. R.D. Blair and J.L. Harrison, *Monopsony-Antitrust Law and Economics* 79 & n.57 (1993).[10]

Klor's and the present case are similar in that the defendant, Broadway-Hale, although only vertically related to its other conspirators, sought to eliminate a competitor, which was the conduct condemned by the Court. *Klor's*, 359 U.S. at 213. The

10. "Group boycotts" do not require boycotters and the ultimate target to be in competition with each other. That only one competitor of the harmed party participates is sufficient. Historically, enlistment of third parties in an agreement not to trade, as a means of compelling surrender by the boycott target, has long been viewed as supporting a finding of unlawful boycott. Various boycott forms are discussed in *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 541-47 (1978), without reference to whether the boycott conduct was *per se* unreasonable. It appears Blair and Harrison read *Klor's* focus to be on the participation of a competitor in boycott conduct through its abuse of purchasing power to force participants in a vertically-related market not to trade with its retail competitor.

Court, though referencing Klor's allegations of "a wide combination consisting of manufacturers, distributors and a retailer", focused on deprivation of Klor's freedom to buy appliances in an open, competitive market, and the deprivation of the manufacturers' and distributors' freedom to sell to Klor's on the same terms available to Broadway-Hale, and in some cases prohibiting sales. *Id.* The present case presents a vertical agreement whose goal was the exclusion of a competitor. As in *Klor's*, there appear no pro-competitive justifications, such as efficiencies. *Klor's*, 359 U.S. at 210 (the defendants' affidavits provide no defense); Pet. App. 12a (no pro-competitive justification appears on the face of the complaint). *See also* R.H. Bork, *The Anti-Trust Paradox: A Policy At War With Itself* 332 (1978) (In antitrust terms, *Klor's* explained by the boycott having no possibility of efficiency and deprived customers of an outlet).

This Court's identification of *per se* violations as those having a "pernicious effect on competition" and lacking redeeming value are apposite here. *Northern Pacific R. Co.*, 356 U.S. at 5. As with *Klor's*, the goal of the vertical agreement in this case was the elimination of a competitor with no pretense of benefit to intrabrand or interbrand competition.[11] The Sherman Act does not distinguish between horizontal and vertical agreements or conspiracies to eliminate competitors. Concerted conduct by vertically arrayed parties is certainly susceptible of damaging markets wherein each participant competes. If a "group boycott" concerns enlistment of a third party or parties in an agreement not to trade, more than one participant at a particular market level is unnecessary where the agreement not to trade has as its object the elimination of a competitor of a party to the agreement. Such conduct suggests *per se* rule application as competitive damage occurs in both supplier and purchaser markets where a competitor is sought excluded. Under such circumstances, Petitioners' conduct is patently anti-competitive and should be permitted analyzed as the Court did in *Klor's*, as a *per se* violation.

11. The vertical agreement in this case, with its goal of eliminating Discon as a competitor represents conduct of a pernicious type that lacks any offsetting legitimate objective. Such conduct is amenable to application of *per se* analysis. That a *per se* analysis may be a category or "special case of the rule of reason" does not undermine the analogizing of the present case to *Klor's*. *Cf.*, IIIA P. Areeda and H. Hovenkamp, *Antitrust Law* ¶ 1509 at 413-414 (Rev. Ed. 1996).

B. Petitioners Rule of Reason Arguments on the Section 1 Claim Should Not Be Considered.

Certiorari was granted by the Court on whether the Court of Appeals erred in characterizing as a "group boycott" the agreement alleged by Discon. Pet. i; Petr. Br. i. Petitioners devoted a substantial portion of their argument to the proposition that Discon has failed to state a claim under the rule of reason. Petr. Br. 22-39. The content of the rule of reason analysis by Petitioners itself suggests the rule of reason question is elementally different from, and not "fairly included" within the question presented. *Izumi Seimitsu Kogyo Kabashiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30-32 & n.5 (1993) (*per curiam*). Although the rule of reason question may be related to the question presented in the petition for certiorari, it is not fairly included therein. *Id.* at 31-32. Petitioners now advance questions and arguments that they did not raise or address below. The "regulatory evasion" argument advanced by Petitioners, characterizing Discon's claim as regulatory fraud masquerading as an anti-trust case, does not appear to have been advanced in such form until Professors Areeda and Hovenkamp published their commentary subsequent to argument in the Court of Appeals. P. Areeda and H. Hovenkamp, *Antitrust Law* ¶ 1644'c at 726-28 (Supp. 1997). In this circumstance, *Izumi Seimitsu's* application is called for.

In the event the Court desires to consider the rule of reason arguments advanced by Petitioner, the Respondent's response is set forth below.

C. Discon Has Stated A Cause of Action Under Section 1 of the Sherman Act Regardless of Whether A *Per Se* or Rule of Reason Analysis Applies.

The Second Circuit clearly stated that Discon had stated a claim under the rule of reason, and , if the vertical agreement challenged had no purpose except stifling competition, a *per se* analysis could apply. Pet. App. 12a-13a n.6. The Petitioners, by ignoring the Court of Appeals' reference to the rule of reason, and the analysis in that court's opinion, assert a conclusion that its decision ignored requisite allegations and "proof of harm to competition". Petr. Br. 19-20. Reference to the Court of Appeals' analysis of the Amended Complaint addresses most of the Petitioner's concerns.

As early as 1923, the Court, through Justice Holmes, articulated the standard for dismissal of an antitrust claim on the pleadings. A court must be "prepared to say . . . at least that the claim is wholly frivolous." *Hart v. B.F. Keith Vaudeville Exchange*, 262 U.S. 271, 274 (1923). "[D]ismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Building Co. v. Trustees of Rex Hospital*, 462 U.S. 738, 746 (1976). Even in a post-discovery context, summary procedures are frowned on in antitrust litigation "where motive and intent play leading roles [and] the proof is largely in the hands of the alleged conspirators." *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 472-73 (1962). These principles apply to anti-competitive intent and to any other challenged element of a Sherman Act claim. *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 246-47 (1980).

1. *Allegations of Harm to Competition*

This Court has repeatedly expressed that the Sherman Act protects competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977), citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). Thus, injury may not be claimed from preservation of competition in the market, as this is inimical to the anti-trust laws. *Brunswick Corp.*, 429 U.S. at 488 (the injury complained of resulted from increased competition).

While there has not been a precise definition by the Court of "competition",

> [t]he Court has observed that a restraint's effect on competition depends on whether the restraint increases or decreases output, which in turn affects the market price.

ABA Section of Antitrust Law, *Antitrust Law Developments* 54 (4th ed. 1997) (footnote references omitted); *N.C.A.A. v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 99-100 (1984); *Broadcast Music, Inc.*, 441 U.S. at 19-20; *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993). Courts have accepted

> three distinct methods of establishing the requisite anticompetitive effect: (1) proof of a "naked" restraint whose adverse competitive effect is so obvious that the

> quick look rule of reason should be applied, (2) proof of actual anticompetitive effect, and (3) market analysis that indicates the restraint will create or facilitate the exercise of market power.

ABA Section of Antitrust Law, *Antitrust Law Developments* 56 (4th ed. 1997). The foregoing, while speaking to proof or establishment of anticompetitive effect, provides a background for evaluating the Amended Complaint.

Petitioners are alleged, in the Amended Complaint, to have conspired with Technologies and AT&T to effect exclusion of Discon as a competitor in the removal services market for NYT central office exchanges and in New York State. J.A. 76 (Am. Compl. ¶ 2); J.A. 82-92 (Am. Compl. ¶¶ 26-63). Each of the lower courts in this case interpreted the Amended Complaint as alleging a conspiracy whose goal was to eliminate Discon entirely as a seller of removal services. Pet. App. 24a (District Court), 4a (Court of Appeals); but *cf.*, Pet. App. 28a (District Court treats as agreement between NYNEX and AT&T to "exclude Discon from NYT's removal service and to award scrap removal service contracts to Technologies instead.")

Overt acts against Discon by the conspirators, to effect Discon's exclusion from the removal services market, reflected the conspirators' goal that Discon was to be eliminated. The effect was an increase in prices in the removal services market. That there were substantial price increases once Discon was eliminated is seemingly without debate, at least as far as the public record reflects in proceedings before the FCC and N.Y. PSC.[12] There has been a clear allegation, and a preliminary showing, that the exclusion of Discon was accompanied by concurrent and subsequent price manipulation as between Technologies (AT&T) and MECo. J.A. 90 (Am. Compl. ¶ 51).

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12. In December of 1988, MECo. agreed with the New York PSC to a partial refund of $42.2 million relating to intrastate overcharges. The FCC made findings that MECo.'s conduct (although the FCC's jurisdiction over MECo. was strongly contested) resulted in NYT's paying inflated prices for goods and services, an unreasonable practice in violation of the Communications Act of 1934, 47 U.S.C. § 201(b). NYT then paid the largest fine (to that time) in FCC history and agreed to make refunds and adjustments to its rate base. J.A. 94-95 (Am. Compl. ¶¶ 65-67). *See also New York Telephone Co.*, 5 F.C.C.R. 866, 5892 (1990).

Whether the Amended Complaint is treated as alleging a conspiracy to eliminate Discon from the removal services market, or, as the government has argued, that an agreement in facilitation of regulatory fraud is an antitrust violation, the effect is the elimination of a competitor and, consequently, elimination of competition. *See* Brief for the United States and the Federal Trade Commission on Petition for Certiorari at 7-11.[13] No procompetitive effects have been suggested or offered by Petitioners; Petitioners would be required to advance such justification as the facts in the Amended Complaint being assumed true.

2. *The Relevant Market — "The Illusion of Competing Sellers"*

Petitioners have stated that to condemn an agreement as anti-competitive, it must make purchasers worse off by limiting the overall range of existing, as well as potential sellers, or their ability to compete, so as to subject purchasers to reduced output and increased price. From this, it is concluded that Discon

> must make allegations from which reasonable inferences may be drawn-that the agreement has harmed . . . marketwide competition to the detriment of the buyers in that market.

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13. Petitioners would have the Court treat this case as one of regulatory fraud, citing P. Areeda & H. Hovenkamp, *Antitrust Law; An Analysis of Antitrust Principles and Their Application* ¶ 1644'c (1997 Supp.), who treated this case as one of fraud because they believe the conduct involved presented no danger of monopoly. The analysis is at odds with an observation in the same treatise that anti-trust intervention is appropriate only when "(1) the regulatory agency is not the effective decision maker, and (2) the conduct really threatens the competitive vigor of a vertically or collaterally related market". IIIA P. Areeda and H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 787 at 284-85. The regulatory action of the FCC and PSC may have addressed the correction of over-charges incorporated in NYT's regulated rate base, but there is no pretense that such regulators could remedy the damage done to competition in the removal services market. NYNEX's response was, in the face of a PSC audit, to take in-house its procurement functions to enable NYT to contract directly with removal service suppliers. J.A. 92 (Am. Compl. ¶ 58). This is another recognition that the removal services market competition had been damaged by the Petitioners, as NYT had recognized that Discon was, in fact, the lower priced, more efficient competitor. J.A. 86-92 (Am. Compl. ¶¶ 38, 39, 40, 41, 42, 43, 51 and 57).

Pet. Br. 22-23. As Petitioner notes, this approach is often formulated as a requirement of proof of actual or threatened market power. *Id.* At 22, n.17.

Revisiting the Amended Complaint, Discon alleged therein that MECo. was created as a purchaser of services and goods and was, in fact, engaged by NYT to handle about 90 per cent of NYT's projects requiring removal services.[14] J.A. 83 (Am. Compl. ¶ 27). NYT and ATC were alleged to be the dominant purchasers of removal services in the "New York State" area. J.A. 83 (Am. Compl. ¶ 29). Technologies was the sole supplier of removal services for ATC, and its predecessor, Western Electric, performed virtually all removal services at NYT central exchange offices. J.A. 82-83 (Am. Compl. ¶ 26). Subsequent to January 1, 1984, NYT was the dominant exchange carrier in New York State, serving every town and city whose population exceeded 25,000 except for Rochester, Jamestown and Middletown. As of December 31, 1989, NYT served about 90 percent of all network access lines in the State, and supplied more than 95 per cent of exchange service and access. J.A. 81 (Am. Compl. ¶ 23).

MECo., through its authority to approve and engage vendors to provide services had, practically speaking, the authority to control competition within the removal services market in New York State for NYT, the overwhelmingly dominant local service provider and removals purchaser. ATC was serviced solely by Technologies, and there is no indication that independents were providing ATC with removal services. Discon has further alleged that MECo. and Technologies maintained at least an 80% market share for removal services in New York State. J.A. 110 (Am. Compl. ¶ 98).

MECo.'s power to approve vendors of services to NYT had the corresponding effect of restricting the vendors to whom NYT could turn, whether "existing sellers or new entrants." As alleged in

14. This occurred after NYT had first tried to do its own removal services work on 1% of the removals, and then administered bids itself only about 10% of the 400 removals. J.A. 83 (Am. Compl. ¶ 27). After these efforts, NYT contracted with MECo. *Id.*

the Amended Complaint, MECo., as part of the vertical agreement, engaged in a number of overt acts against Discon to further Technologies' dominant position as a provider of removal services, eventually leading to disqualification of Discon as a vendor. J.A. 84-91 (Am. Compl. ¶¶ 33(c, d, e), 34, 35, 37-43, 45-47, 49-55).

Rule of Reason analysis of Section 1 claims requires the trier of fact to delineate the "relevant market". A relevant market is comprised of those "commodities reasonably interchangeable by consumers for the same purposes. . . ." *United States v. E.I. DuPont deNemours & Co.*, 351 U.S. 377, 395 (1956). The proper market definition is usually determined only after a factual inquiry into the "commercial realities" faced by consumers. *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966).

The measure of market power under Section 1 is something less than the monopoly power under Section 2. *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992). In the present case, MECo., approving vendors, and hence their services, controlled NYT's access to the removal services market, and conversely, the suppliers' access to NYT.[15] Stated otherwise, the effect of the NYNEX conspiracy with AT&T and Technologies was to deprive NYT of choice, by excluding Discon, with a corresponding impact on price, that is the ability to charge supracompetitive prices, indicating market power. *See, e.g., NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 109 n.38 (1984). There has been no proffer of facts by the Petitioners that there was

15. The Court has recognized that, with respect to Section 2 monopolization and attempt to monopolize cases, the definition of the relevant market may involve analysis of submarkets that are separate economic entities. *Grinnell*, 384 U.S. at 571-72, citing *Brown Shoe*, 370 U.S. at 325. Thus, the relevant market may be removal services for NYT exchange facilities, or for the New York State area. In the context of MECo.'s conduct, this would be an issue to be determined after discovery. Presently, it is sufficient to refer to markets, at the pleading stage, that are susceptible of proof. *MCM Partners*, 62 F.3d at 977, citing *Conley v. Gibson*, 355 U.S. at 45-46.

any other provider choice available to the dominant purchasers of removal services in the New York State market.[16]

NYT's overwhelming presence in local telephone service (about 90% of exchange service access), combined with Technologies servicing of all ATC requirements and its effecting of its dominance in serving NYT needs created an unusual combination of monopsony buyer (MECo.) power and Technologies' dominance indicating monopoly strength. MECo.'s control of vendor approval (acquisition of services) and Technologies' dominance over provision of removal services to NYT and in New York State may well meet the Court's test for monopoly power — "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power." *DuPont*, 351 U.S. at 394. Petitioners conspired with AT&T and Technologies to exclude Discon from the market, with the "existence" (availability) of suppliers, if any, controlled by MECo. and Technologies. *Cf.*, *United States v. Grinnell Corp.*, 384 U.S. at 571 (87% of the market is a monopoly); *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946) (over two-thirds of market is a monopoly).

MECo.'s control of the purchaser market and approval of suppliers thereto, and the dominance by Technologies in the supplier market sought furthered by the conspiracy, meet the criteria for pleading of actual or threatened market power. The effect of this power was to facilitate MECo.'s use of high cost vendors, (*i.e.*, Technologies) in lieu of extreme markups by MECo. to historic Western Electric service costs, by suppressing or excluding low cost vendors (as Discon) in the services market, despite the objections of NYT to the extreme mark-up conduct. J.A. 90 (Am. Compl. ¶ 51). Petitioners should not be permitted to seek a relevant market

16. Technologies agreed with MECo. to serve as a subcontractor of MECo. for most removal services contracts, and MECo. agreed to award Technologies most contracts on a non-competitive basis. J.A. 84 (Am. Compl. ¶ 31). Other than Discon and Technologies, there was one nominal removal service supplier approved by MECo. (LISN), but these were not known others to have been so approved. Even if such suppliers existed, their ability to obtain services contracts was subject of MECo.'s "gatekeeper" powers. Also, supracompetitive prices were charged by Technologies to MECo. once NYT objected to MECo.'s abusive markups, by MECo.'s use of the higher cost vendor. J.A. 90 (Am. Compl ¶ 51).

broader than that their conspiracy sought to create by exclusion of Discon to effect Technologies' complete dominance of the removal services supplier market. The conspiracy (vertical agreement) itself focused on exclusion of alternative competing suppliers of services, making their hypothetical availability practically irrelevant. To aver that NYT might supply its own services or to bid them out itself is not substantiated by the uncontroverted pleading challenged herein, as NYT had put its fate in MECo.'s hands. J.A. 83 (Am. Compl. ¶ 27).

This Court has observed that dismissal on pleadings should rarely be granted in anti-trust conspiracies because "proof . . . is usually in the hands of the co-conspirators." *Hospital Building Co. v. Trustees of Rex Hospital*, 462 U.S. at 746. The Amended Complaint identified the co-conspirators and described the "nature and effect" of the Section 1 conspiracy. *General Electric Co. v. Bucyrus-Erie Co.*, 563 F. Supp. 970, 975 (S.D.N.Y. 1983). The "nature and effect" of the alleged conspiracy was to effect the exclusion of a competitor from, and thus lessen competition in, the market for removal services. J.A. 112 (Am. Compl. ¶ 110), J.A. 82-92 (Am. Compl. ¶¶ 26-57). The co-conspirators are identified. J.A. 78-80, 82-92 (Am. Compl. ¶¶ 14-19, 25-57), and various overt acts in implementing the conspiracy (and hence the vertical agreement challenged) were alleged in substantial detail though no discovery has occurred. J.A. 84-92 (Am. Compl. ¶¶ 31, 33-39, 41, 46, 47, 49-51). Because a review of the impact on the market will show an unreasonable exclusion of Discon, the vertical agreement, as an integral part of the conspiracy, will not pass muster under Rule of Reason analysis as a non-price vertical restraint. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984), citing *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977).

Discon has properly alleged the elements of a Section 1 conspiracy, respecting the vertical agreement at bar. A relevant market has been identified, shaped by the acts of MECo., a party to the agreement, by exclusion of a competitor, Discon, to enhance the dominance of Technologies in that market, as well as in the New York State market, in which the conspirator competitor Technologies had a market share of at least 80%. Thus, Technologies, Discon's

competitor is alleged to have and did benefit from the inhibition of competition.

3. *The Involvement of Regulated Monopolies Does Not Affect Antitrust Enforcement Respecting Unregulated Markets.*

Petitioners repeatedly refer to the need for freedom to make efficient changes of suppliers or to enter into efficiency-enhancing requirements agreements. Petr. Br. 26-27. No procompetitive justifications have been advanced by Petitioners, making references to efficiency-justified actions theoretical in the present posture of this case.

Petitioners suggest that regulated utilities' involvement in the conspiracy lessens the need for antitrust scrutiny. Petr. Br. 27. This is a diluted version of the argument rejected in the *AT&T Case*, 552 F. Supp. at 156-157, and in preceding actions, wherein the District Court observed that regulation under the federal Communications Act "is neither sufficiently explicit nor sufficiently pervasive to allow it to stand in the way of the antitrust laws." (footnotes omitted). *See also United States v. American Tel. And Tel. Co.*, 524 F. Supp. 1336, 1345 (D.D.C. 1981); *United States v. American Tel. And Tel. Co.*, 461 F. Supp. 1314, 1320-30 (D.D.C. 1978). Similar arguments about state utility regulation have been made and similarly rejected. *AT&T Case*, 552 F. Supp. at 156-59.

In *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 593-96 (1976), this Court stated, in a regulated utility context wherein the utility provided free replacement bulbs to its customers, that where a state-regulated entity became involved "in an essentially unregulated area such as the market for electric light bulbs" the existence of state regulation would not foreclose antitrust law enforcement. *Id.* at 595.

In *Cantor*, the Court advised that public utility regulation assumes "the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation[,]" and then stated

> There is no logical inconsistency [between requiring a firm to satisfy regulation when exercising natural monopoly powers] and also to comply with antitrust

> standards to the extent it engages in business activity in competitive areas of the economy.

428 U.S. at 596.

Petitioners have not asserted that the removal services market was regulated. MECo. was unregulated and was dealing with unregulated service vendors. Discon's claim is that it was excluded from the unregulated removal services market and that competition was thereby harmed. There should be no less antitrust concern, because certain conspirators were regulated in their natural monopoly functions, when Discon was excluded from an unregulated suppliers market.[17]

D. Competitive Harm Alleged By Discon Was Its Exclusion From The Unregulated Supplier Markets.

The Second Circuit was concerned with the exclusion of Discon from the removal services market. This was the case for both Sherman 1 (Pet. App. 4a) and Sherman 2 (Pet. App. 15a) claims, as the Court of Appeals interpreted the Amended Complaint. Petitioners argue that the Second Circuit "relied on the claim of regulatory evasion as itself establishing competitive harm[,]" Petr. Br. 27-28, and thereby confused harm to ratepayers of the regulated monopoly conspirator with harm in the alleged markets for removal services, "the only markets where competition is even claimed to be restrained." Petr. Br. 28. Petitioners' comments acknowledge that the removal services markets are identified in the Amended Complaint as the subject of the vertical restraint at issue.

The relevant market has been created, in material part, by MECo.'s own conduct, MECo. having been granted by contract the power to approve vendors and let contracts for provision of services and products to NYT. J.A. 83 (Am. Compl. ¶ 27). MECo. was not

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17. The Court of Appeals treated MECo. as unified with NYT and NYNEX due to application of the *Copperweld* principle that a parent and a subsidiary cannot conspire for Sherman 1 purposes. Pet. App. 9a-10a. *Copperweld's* application should not be permitted to vitiate the *Cantor* analysis as to the applicability of antitrust in non-regulated markets, particularly where one of the "unified" conspirators was the unregulated MECo.

regulated by either the FCC or N.Y. PSC, both of which focused their regulatory efforts on remedying the rate base effects arising from the stifling of competition in the unregulated supplier market. J.A. 94 (Am. Compl. ¶¶ 65-67).

MECo. did not provide regulated services, nor did it file tariffs or otherwise seek regulatory approval for its activities. Rather, MECo. was established for, as well as operated, in markets beyond regulatory control, and the Amended Complaint so alleges. J.A. 82 (Am. Compl. ¶¶ 24-25). Compare, *AT&T Case*, 552 F. Supp. at 186-187 (BOC(s) not to provide any product or service not a natural monopoly service regulated by tariff).

The Court of Appeals' language speaks of the lack of justification of Petitioners' choice of Technologies over Discon in the removal services market. Pet. App. 12a. Petitioners interpret the Second Circuit's comment that the Petitioners might advance a pro-competitive justification for more costly supplier choice to permit overcharging of rate-paying customers as indicative that the harm being addressed was to the ratepayer. Petr. Br. 28. The conduct being focused on is the choice of supplier in the removal market and the justification therefor. Relevant market considerations being addressed are those in the removal services market. Petitioners confuse the Court of Appeals' observation on potential justification for their actions with the market in which they are causing damage.

Petitioners' argument is merely an expansion on the comments of Professors Areeda and Hovenkamp that the present case presents an issue of regulatory fraud, because, purportedly, there was no threat of monopoly. Areeda & Hovenkamp, *Antitrust Law* ¶ 1644'c (Supp. 1997). Such analysis of this case was, as noted above, in conflict with the same authors' observations that in the context of regulated monopolies, antitrust concerns are a particular problem in the context of monopoly or near monopoly in the supplier market. IIIA Areeda and Hovenkamp, *Antitrust Law* ¶ 787(b).

Antitrust policy is particularly implicated when a regulated monopolist, directly or indirectly, is involved in conspiracies that impact competition in an unregulated market. *Cf., Cantor v. Detroit Edison*, 428 U.S. at 596, concerning activity in the competitive economy. That Discon also claims it was harmed as a ratepayer

does not give credence to the argument that the competitive harm at issue was in the telephone service market, as Discon is not a provider of telephone services. Also, there would be little or no competition in the regulated monopoly telephone service market, because "public utility regulation typically assumes the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation." *Cantor*, 428 U.S. at 595-96. The argument that the Second Circuit saw "competitive harm" in a regulated monopoly context is a straw man as there is, by definition, no "competition" in the anti-trust sense therein, as distinguished from the suppression of competition in the unregulated supplier market.

Petitioners' arguments as to the necessity for "proof" of competitive harm are premature, because proof is not necessary on a motion to dismiss. The relevant market boundaries are normally determined by market place facts, and thus, it is the susceptibility of the market(s) alleged to proof which is considered. *See, e.g., MCM Partners*, 62 F.3d at 976-77; ABA Section of Antitrust Law, *Antitrust Law Developments* 544-45 (4th ed. 1977); ABA Section of Antitrust Law, 1997 *Annual Review of Antitrust Law Developments* at 170-71.

Petitioners' attack on the Government's theory that regulatory evasion causing anticompetitive effects was susceptible of treatment under antitrust law misapprehends the Government's theory. The Government's concern was that once the regulated monopolist became involved in conspirational efforts to harm competition in an unregulated supplier market, its conduct is subject to antitrust scrutiny. SG Petr. Br. 7-12.[18] Certainly the Court does not view as novel the susceptibility of a regulated monopoly to antitrust regulation once it becomes involved in unregulated, competitive markets. The

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18. Discon's comments about the *Copperweld* principle rejecting intracorporate enterprise conspiracy under Sherman 1 as distinguished from the *Cantor* decision's effect on susceptibility of regulated utilities to antitrust regulation when involved in competitive market activity also apply here. The actual conspirator involved is MECo., which is not regulated. Furthermore, if Petitioners are treated as the same for *Cantor* purposes, they would still be subject to antitrust regulation as the supplier market is not regulated.

Government's theory corresponds with *Cantor*, as the market from which Discon was excluded was not the telephone services market, but the removal services market. J.A. 82-92 (Am. Compl. ¶¶ 26-57).[19] To otherwise contend would cast the Government's theory as requiring antitrust regulation applied to a telephone services market which, under *Cantor*, would be considered a natural monopoly requiring regulation and being already regulated. Such an argument is counterintuitive. The conduct addressed by the Government, the Second Circuit and Discon is the conspirators' overt acts to stifle competition in the supplier market. At no time in these proceedings or the proceedings in the lower courts have Petitioners pointed to FCC or N.Y. PSC actions which provided remedies for supplier market harm, as those agencies do not have that jurisdiction. Petitioners seek to revisit the debate about the lack of explicitness and pervasiveness of federal and state communications utility regulation that do not justify "[allowing] it to stand in the way of the enforcement of the antitrust law." *AT&T Case*, 552 F. Supp. at 156-59.

E. Competitive Harm In the Removal Services Market Is Adequately Alleged.

In Point I.B.1 of this brief, Discon has set forth the content of its allegations pertaining to competitive harm in the removal services market. The basis thrust of Petitioners' argument is that the Amended Complaint deals with a regulatory and not an antitrust issue.

Petitioners' first point is that Discon's exclusion from the removal services markets effected by MECo.'s decertifying it as a vendor did not exclude Discon from serving "other available buyers of removal services[,]" and that the harm, even respecting the markets alleged, did not constitute harm to competition on a marketwide basis respecting the ability of suppliers of removal services to offer lower prices or better service in competition "with AT&T and other providers of removal services." Pet. Br. 37. There is implicit in Petitioners' position that the relevant market is not properly designated

19. The Government's theory also corresponds with Professors Areeda and Hovenkamp's observations as to when anti-trust intervention may be necessary. IIIA Areeda and Hovenkamp, *Antitrust Law* ¶ 787b.

in the Amended Complaint. Relevant market analysis is a function of market characteristics. *See, e.g., Grinnell*, 384 U.S. at 571-75. Discon's pre-discovery perception of the relevant market is set forth in Point I.B.2 *supra*, and is focused on the market in which Discon was interested in remaining and/or entering. Whether the relevant market is duly constituted in such circumstances should abide discovery. Compare, *Fishman v. Estate of Wirtz*, 807 F.2d at 531-32 (relevant market defined as that to which access had been sought and foreclosed by anti-competitive conduct even if plaintiff had other business opportunities).

Petitioners', and particularly MECo.'s, conduct in controlling the qualification of suppliers created a circumstance wherein AT&T (Technologies') would have no competition in the provision through MECo., of services to NYT (the regulated monopolist) absent MECo.'s acquiescence. This was goal of the conspiracy, to stifle competition to allow for service prices corresponding to those existing when pre-divestiture Western Electric provided removal services to NYT. J.A. 90 (Am. Compl. ¶ 51). Petitioners' argument overlooks the function of MECo., to determine "qualified" vendors in the overwhelming part of the market for such services that was not already exclusively serviced by Technologies within New York.

Petitioners' second point concerning barriers to entry, purchaser deprivation of existing alternatives, and other characteristics that would impede new firms from entering to compete to correct output shortage or raising of price simply ignores the allegations of the Amended Complaint. During the commission of overt acts to effect exclusion of Discon, MECo. ceased the practice of using extreme markups in its rebilling of vendor supplied services to NYT, instead using high cost vendors who charged above the market price. J.A. 90 (Am. Compl. ¶ 51), J.A. 86-91 (Am. Compl. ¶¶ 34, 39, 41-48, 52, 56). MECo., NYNEX and AT&T were simply not going to permit competition in the removal services market.

Petitioners' reference to other vendors (present and potential suppliers of removal services) Pet. Br. 37, refers to co-conspirators with NYNEX, MECo. and NYT to effect monopolization of the market. J.A. 111-112 (Am. Compl. ¶ 107). The Amended Complaint clearly identifies McGee as a conspirator with AT&T who was

rewarded for his work by receiving subcontracts for removals through AT&T. J.A. 85, 89 (Am. Compl. ¶¶ 33(a), 47). NYT chose not to service its removal needs, and, as alleged, did so on only 1% of the removal jobs before bidding work out itself and then through MECo. J.A. 83 (Am. Compl. ¶ 27).

Easy entry assertions by the Petitioners, Pet. Br. 37-38, ignore that Discon, as well as other vendors, had to be approved by MECo. Yet, Petitioners have not come forward to show that MECo. approved viable vendors other than Discon and Technologies.

Petitioners deem it "implausible" that "NYNEX" would be agreeing to subject itself to higher pricing set by removal service sellers in an "output-constricted (and entry protected) market." Pet. Br. 38. This is precisely what "NYNEX" did. It must not be forgotten that "NYNEX" was unitary only in terms of the intracorporate conspiracy theory disapproved in *Copperweld*. "NYNEX" was not unitary in reality, as MECo. was set up as an unregulated procurement entity that engaged in stifling of competition in the removal services market, allowing supracompetitive prices to be charged to purchaser MECo. The various parts of "NYNEX" played their roles to stifle, with AT&T, competition in the removal services market. J.A. 84-91 (Am. Compl. ¶¶ 32-57). "NYNEX" effected, through use of NYT and MECo., the very form of regulatory evasion that calls for application of the anti-trust laws, effecting the procurement functions for the regulated monopolist through a commonly controlled, but unregulated entity, through and with which it conspired with AT&T to suppress competition in the supplier market, raising the prices in that market through activity of the "separate" procurement entity.[20]

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20. Similar concerns are expressed in IIIA Areeda and Hovenkamp, Antitrust Law ¶ 787b, but such concerns are normally expressed in respect of Section 2 violations, which may explain Profession Areeda's characterization of the present case in the context of threat of monopoly, a Section 2 concern, rather than the lesser measure of market power required for a Section 1 violation. *Cf., Eastman Kodak*, 504 U.S. at 481. Why there should only be a concern with the higher monopoly standard in the context of *Cantor* is not explained by Professor Areeda.

Petitioners observe that

> [I]t is simply not rational economic behavior for a buyer like ["]NYNEX["] to agree to create market conditions — a shortage of suppliers protected by entry barriers — in which it could then be exploited.

Petr. Br. 38 (cites omitted). The allegations of the Amended complaint are specific on this point. NYT, though under the control of NYNEX and having contracted with MECo., desired to deal directly with Discon as the low cost vendor, but was repeatedly thwarted by the acts of NYNEX and AT&T, which acts are described in some detail. J.A. 84-86, 89 (Am. Compl. ¶¶ 33, 34, 35, 36 and 47). NYNEX and MECo. also are specifically alleged to have engaged in anti-competitive acts to effect exclusion of Discon. J.A. 84-92 (Am. Compl. ¶¶ 32, 34, 36-57). NYNEX's conduct in preventing NYT from dealing directly with Discon through interposition of MECo. furthered its agreement with AT&T to allow all parties to charge supracompetitive prices and generate supracompetitive profits in the supplier market. This is a version of the conduct Professors Areeda and Hovenkamp observe should be subject to antitrust regulation. IIIA Areeda and Hovenkamp, Antitrust Law ¶ 787b.

Petitioners would have this Court believe, despite FCC and N.Y. PSC investigations of NYT's transactions with its affiliates, particularly MECo., resulting in tens of millions of dollars in overcharges to NYT, that the conduct alleged of NYNEX is "implausible". MECo.'s conduct, whether it engaged in markup of Discon's bids of up to 1000% or resorted to a high-cost vendor like Technologies, was focused on inhibition of supplier market competition for NYT removals and in New York State. Discon's allegations are specific, provide evidence of overt acts and their impact. It is incredible that NYNEX so overtly attempted to suppress competition in the supplier market and then assert that the accusations about its conduct are implausible. The Amended Complaint was not properly dismissed by the District Court.

II.

A PURCHASER-SUPPLIER AGREEMENT TO EXCLUDE A COMPETING SUPPLIER CAN CONSTITUTE AN UNLAWFUL CONSPIRACY TO MONOPOLIZE WHEN THE CONSPIRATORS INTEND FOR THE CONSPIRING COMPETITOR TO MONOPOLIZE THE MARKET.

The Second Circuit concluded that the Amended Complaint stated a conspiracy-to-monopolize claim because of allegations that Petitioners conspired with AT&T to eliminate Discon with the specific intent to secure monopoly power for AT&T (*i.e.*, Technologies) in the relevant removal services markets. Pet. App. 14a-15a. The Court of Appeals correctly decided that Discon's allegations state a Section 2 claim.

In *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 612 n.1 (1977), the Court described a Section 2 conspiracy as one in which two or more actors share a specific intent to monopolize a market, that is intent to create or maintain a monopoly by improper means. In the context of a Section 2 conspiracy claim, Discon need only state allegations "of some conduct permitting an inference of specific intent to monopolize. *Strobl v. New York Mercantile Exchange*, 561 F.Supp. 379, 384 (S.D.N.Y. 1983); *see also Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 85 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). The Amended Complaint exceeded the standard, describing numerous events of concerted conduct involving, among others, NYNEX and AT&T, that readily infer specific intent. J.A. 86-87, 89-91, 112-113 (Am. Compl. ¶¶ 34-36, 39, 47, 51, 54, 56 and 107).[21]

Section 2 does not require that all the conspirators be competitors in the market in which monopoly power is sought. *See, e.g., Perrington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1377 (10th Cir. 1979); *Strobl*, 561 F. Supp. at 384 (a third party not a "competitor" in the market may also serve as a Section 2 conspirator).

21. In Section 2 cases, specific intent is discerned through overt acts as well as agreements. 2 J. VonKalinowski, P. Sullivan and M. McGuirl, *Antitrust Laws and Trade Regulation* § 26.02[2] at 26-25 to -26 (2d ed. 1996).

NYNEX's objection that Discon failed to allege a relevant market is inadequate on two grounds. First, since a conspiracy to monopolize claim does not require actual or potential achievement of monopoly power, there is not a necessity of alleging a relevant market, though proof is later necessary, in a market analysis context, to show effect on a "substantial amount of commerce" and specific intent. 2 J. VonKalinowski, Sullivan and McGuirl, *Antitrust Laws and Trade Regulation* § 26.02[6]. Although Discon defines a market that the conspiracy effectively monopolized, this is not an essential element of a Section 2 conspiracy to monopolize. *Olsen v. Progressive Music Supply*, 703 F.2d 432, 438 (10th Cir.), *cert. denied*, 464 U.S. 866 (1983); *Salco Corp. v. General Motors Corp.*, 517, F.2d 567, 576 (10th Cir. 1975); *United States v. Consolidated Launderies Corp.*, 291 F.2d 563, 573 (2d Cir. 1961).[22] Second, Discon has alleged a relevant market, that for removal services within the State of New York and a narrower NYT-only market. Point I.B.2 *supra*.

Discon identified one purchaser of removal services other than the conspirators, that being Rochester Telephone. (J.A. 91 (Am. Compl. ¶ 53). If the conspiracy alleged in the Amended Complaint succeeded, excluding Discon from the removal services market with the purpose of securing monopoly power for AT&T therein, purchasers of removal services such as Rochester Telephone would have been deprived of the benefits of competition. A principal policy of Section 2 is to protect purchasers and consumers from the creation or maintenance of monopoly power. *See, e.g., American Tobacco Co.*, 328 U.S. at 788-89.

Petitioners raise two other points for the Court's consideration. First, they again argue that Discon alleged harm only to itself and not

22. "Dangerous probability" of achieving monopoly power is not required in conspiracy to monopolize cases, as distinguished from attempt cases. As stated in *Consolidated Launderies Corp.*, 291 F.2d at 573, "[W]here the charge is conspiracy to monopolize, the essential element is not the power, but specific intent to monopolize." What is required is that a "substantial amount of commerce" be affected. *DuPont*, 351 U.S. at 225. Compare, *Spectrum Sports, Inc. v. McQuillen*, 506 U.S. 447, 458-59 (1993) (in the context of Section 2, single firm conduct, inquiry required into relevant product and geographic market and economic power therein).

competition. (Pet. Br. 37-38) and because Discon argued the conspiracy was designed to obtain monopoly power for Petitioners, not AT&T (Pet. Br. 40-41). Second, it is argued Discon's claim should have been dismissed because it alleged Petitioners conspired to create a monopoly to their detriment. (Pet. Br. 38-39, 42).

Discon notes that the Court granted, and Petitioners sought, certiorari on the question whether a vertical non-price agreement between "a [p]urchaser" and its "[s]upplier" could "be characterized as a conspiracy to monopolize." Pet. i; Pet. Br. i. Petitioners' discussion of that question was couched in a buyer's freedom of choice never being subject to conspiracy to monopolize analysis, even where the result was monopoly power acquisition. Pet. 16. This proposition was also stated in terms of the purchaser's role consisting solely of favoring the purported monopolist as a supplier. Pet. 14-15. If Petitioners' arguments are addressed to the Court of Appeals' reading of the Amended Complaint as Petitioners' specifically intending to assist AT&T in monopolizing of the removal services market (Pet. Br. 39-40), this is not the issue on which certiorari was granted. The same may be said concerning the Petitioners' assertions that Petitioners' participation in a Section 2 conspiracy would be implausible in common sense terms. Pet. Br. 40-41. Petitioners seek to introduce new issues into the case that are not fairly within the scope of this Court's grant of *certiorari*. Such new issues are not fairly included in the questions presented and should not be considered, as "[o]nly questions set forth in the petition, or fairly included therein, will be considered by the Court". *Izumi Seimitsu Kogyo Kabashiki Kaisha v. U.S. Philips Corp.*, 510 U.S. at 30-32 & n.5 (1993) (application of Sup. Ct. Rule 14.1(a) as to the Court's consideration only of questions set out in the petition or fairly included therein).

The "implausibility" position has been previously addressed in this brief. Point I.D., *supra*. For the same reasons "implausibility" failed in the Section 1 context, it should also fail in the Section 2 conspiracy to monopolize contest. There are additional reasons that "implausibility" should be rejected.

"NYNEX", specifically MECo., is alleged, with ATC (AT&T) to be the dominant purchasers of removal services in the New York State area.[23] J.A. 82 (Am. Compl. ¶ 29). Technologies, Discon's competitor, was alleged to be the dominant supplier of removal services in the same market. J.A. 82-83 (Am. Compl. ¶ 26). Professors Areeda and Hovenkamp have observed that regulation changes the traditional concept of a monopolist being able to obtain "full monopoly profit" in the monopoly market, giving the monopolist no reason "to restrict output by raising the price at the [unregulated] stage into which [the monopolist] integrated."[24]

Due to regulatory avoidance that created supracompetitive prices in the supplier market, "NYNEX" behavior, as reflected by MECo. activity, was contrary to that of a buyer in an unregulated supplier market who would be expected to procure at the lowest cost. "NYNEX", *i.e.* MECo. and NYT, would be expected to reduce transaction costs in the purchase of services in the unregulated supplier market. This did not happen, indicating that the purchaser dominance presented a monopsony problem, which, as in the monopoly context, injuries consumers. It is rational, not implausible, that NYNEX would participate in a conspiracy to monopolize the supplier market as this would complement the purchasing dominance of NYNEX and AT&T. This would damage consumers in the removal services market, such as Rochester Telephone, while permitting the pass-through of supracompetitive prices to the regulated monopoly customers.[25] "NYNEX" may be both a monopolist in NYT's

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23. This is not an acknowledgment that a Section 2 conspiracy to monopolize claim requires relevant market allegations.

24. IIIA Areeda and Hovenkamp, Antitrust Law ¶¶ 787b at 282.

25. "NYNEX"'s conduct is the converse of what a regulated monopolist would be expected to do in its supplier market. In *Kartell v. Blue Shield (Mass.)*, 749 F.2d 922, 930-931 (1st Cir. 1984), *cert. den.*, 471 U.S. 1029 (1985), Blue Cross capped prices it would pay for physician services, by refusing to allow participating physicians services, by refusing to allow participating physicians from charging more than Blue Cross paid the physicians. Ultimately, this resulted in consumer benefit to the extent that supracompetitive prices were undermined or lower service prices resulted in lower premiums. *See also* IIA P. Areeda, H. Hovenkamp and J. Solow, (Cont'd)

regulated telephone service market and a monopsonist in the supply market for removal services.

With the dominance of AT&T and NYNEX in the removal service purchaser market, there is the prospect, if not the existence, of cartelizing in the purchase of removal services which, like cartels among sellers, can disrupt the market. *See* IIA Areeda, Hovenkamp and Solow, *Antitrust Law*, ¶ 574 at 301 & n.7. That the cartelizing purchasers sought to induce supracompetitive prices in the supplier market by conspiracy with Technologies to monopolize that market is not surprising when the disruption of the supplier market, with its supracompetitive prices, could work to the purchasers' benefit. This is simply another version of the conduct of regulated monopolists who integrate into an unregulated market and distort the unregulated supply market by seeking to monopolize that market by elimination of competition therein. Compare, *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 374 (7th Cir. 1986) (Posner, J.), *cert. den.*, 480 U.S. 987 (1984).

Discon posed a threat to the conspiracy to monopolize the removal services market by its very existence as a low cost competitor to Technologies. As the Second Circuit observed, the Amended Complaint sufficiently alleged Petitioners conspired with Technologies and performed overt acts intending to assist Technologies in monopolizing the removal services market. Specific intent plead was met by allegations that MECo. sought Technologies' dominance to ensure suppression of competing suppliers who would bypass MECo. and deal directly with NYT. Pet. App. 14a-15a. This directly contravenes Petitioners' assertion that the "profit-making mechanism of regulatory evasion in no way depended on or implied" the creation of monopoly power in the removal services market. Pet. Br. 38. The citation by Petitioners of *TV Communications Network, Inc. v. Turner Network Television. Inc.*, 964 F.2d 1022, 1026-27 (10th Cir.), *cert. denied*, 506 U.S. 999 (1992) is of no aid to their position, because

(Cont'd)
Antitrust Law ¶ 574 at 299-300. (1995 rev. ed.). It also has been pointed out that most Section 1 challenges usually fail because the insurer is a single buyer and can unilaterally shop for favorable terms. P. Areeda and L. Kaplow, *Antitrust Analysis* 251, n.27 (1988)

the complainant in that case failed to allege "a relevant market which TNT was capable of monopolizing, attempting to or conspiring to monopolize." *Id.* at 1028. The complaint had alleged the relevant product market as "the market for the TNT channel in Metropolitan Denver", in response to which the Tenth Circuit stated that "a company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product." *Id.* at 1025, citing *DuPont*, 351 U.S. at 393. The "implausibility" alluded to by Petitioners is, *inter alia*, a natural monopoly over one's own product does not violate Sherman 2, an "implausibility" at law. NYNEX has not, in the present case, previously referred to the market for removal services as one in which Technologies had a "natural monopoly" that made a Sherman 2 claim legally unsustainable.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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